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In the Supreme Court of the United States

OCTOBER TERM, 1971

THE CITIES OF TEXARKANA, TEXAS, AND TEXARKANA, ARKANSAS, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-25a) is reported at 444 F. 2d 969. The opinions of the Civil Aeronautics Board are not yet reported.[1]

[1] Petitioners have lodged ten copies of each of the Board's opinions with the Clerk of this Court as an unprinted appendix to their petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971. A petition for rehearing *en banc* was denied on June 2, 1971. On August 27, 1971, Mr. Chief Justice Burger extended the time within which to file a petition for a writ of certiorari to and including September 30, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board's decision not to authorize direct Texarkana-St. Louis air service was supported by adequate findings.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301 *et seq.*) are set forth in the Appendix, *infra.*

STATEMENT

This petition involves a challenge to decisions of the Civil Aeronautics Board in two airline route proceedings known as *Central Airlines, Inc., Route 81 Investigation* (*"Central Route 81"*) and *Gulf States-Midwest Points Investigation* (*"Gulf States"*).

1. In May 1965, the Civil Aeronautics Board instituted the *Central Route 81* case, which, as ultimately

structured, became "a vehicle for 'reappraisal of much of the local service needs in the southwest area' " of the United States (Pet. App. 5a). Applications for new or amended route authority filed by six airlines were consolidated into the proceeding. Also consolidated were petitions by a number of cities for new or improved service, including the petitions by the twin cities of Texarkana, Texas and Arkansas ("Texarkana"), which sought service to Houston, New Orleans, St. Louis, Tulsa, Oklahoma City and Kansas City via various intermediate points.

Following evidentiary hearings, the examiner issued his initial decision on April 12, 1968. He found that Texarkana had a very poor traffic-generating history (Pet. App. 9a, n. 12), and, while conceding that "to some extent" this might be attributable to inconvenient service, he concluded that there was an insufficient traffic potential to support most of Texarkana's requests without a significant increase in federal subsidy. Such an expenditure, in his opinion, would be out of proportion to the public benefits. See Pet. App. 8a, n. 9. Texarkana's request for direct service to Houston and New Orleans, however, should be granted, the examiner concluded. He found that Texas International Airlines could provide the service without subsidy and that this would greatly improve the cities' air services. On limited discretionary review,

the Board sustained the examiner's decision with respect to Texarkana.[2]

2. The *Gulf States* route proceeding was instituted shortly after the scope of *Central 81* had been fixed; its purpose was to consider authorization of new or competitive service in ten important longhaul markets, including Houston-St. Louis (Pet. App. 10a). While possible intermediate points on any of the segments at issue would be considered, the focus of the proceeding was to be on the needs of the ten "prime" markets, and, to this end, the Board provided at the outset that any flight operated pursuant to an award could serve but one intermediate point between terminals. Thirty-three applications by 14 carriers and 11 cities were consolidated for hearing, including one

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[2] Texarkana service was only tangentially involved in the Board's decision. The principal issue on review was selection of a carrier to provide additional nonstop Memphis-St. Louis service, which the examiner had found required by the public convenience and necessity, and for which he had selected Ozark Air Lines. Texas International was an applicant for Memphis-St. Louis authority. Its existing routes include a segment on which both Texarkana and Memphis lie. Thus, were it to be selected to operate from Memphis to St. Louis, Texarkana-St. Louis service by Texas International would have been possible. In its decision on discretionary review, however, the Board narrowed the choice to Ozark and Southern Airways, finding that the benefits either of them would provide outweighed those which would flow from Texas International's selection. This determination was challenged by Texas International in the court below; the Board's determination was sustained, and Texas International has not sought review in this Court.

by Texarkana seeking service to St. Louis and a number of other cities (Pet. App. 11a).

Just prior to the Board's grant of limited discretionary review in *Central 81,* the examiner issued his initial decision in *Gulf States.* Most significant for present purposes was his discussion of the Houston-St. Louis market which, he concluded, required new service. Although he determined that Texarkana and four other points (Memphis, Shreveport, Little Rock, and Beaumont/Port Arthur) were geographically feasible intermediate points on the Houston-St. Louis route, it was his opinion that none of them should be so designated. With respect to Texarkana, he stated that it "obviously lack[s] the traffic potential to support a stop * * *" (Pet. App. 13a).

On discretionary review, granted *sua sponte,* the Board affirmed, adopting the examiner's findings and conclusions. In addition, it observed that inclusion of points such as Texarkana as intermediate points would run counter to the Board's goal of achieving the optimum pattern of express service in the prime market; there was not, in its view, sufficient justification in terms of public benefits from service at the intermediate points to warrant such a result (Order 69–9–18, p. 11).

3. Texas International petitioned the court of appeals for review of various aspects of the Board's orders in both cases, pursuant to 49 U.S.C. 1486. Thereafter, Texarkana filed a similar petition, and

the review proceedings were consolidated. Two other carriers and three cities were permitted to intervene to challenge other facets of the orders.

On April 30, 1971, the court of appeals unanimously affirmed the Board's orders (Pet. App. 25a). It held that "the Board's findings are supported by substantial evidence and that its conclusions flow rationally from such findings * * *" (Pet. App. 22a).

ARGUMENT

Petitioner's challenge here goes only to the adequacy of the Board's findings in the context of a factual situation that is peculiar to these consolidated route cases. The attack on those findings is, as we show below, insubstantial and does not warrant further consideration by this Court.

1. The Board limited its certification of airline service at Texarkana to direct service to Houston and New Orleans because the inclusion of Texarkana as an intermediate stop on the longhaul routes would detract from service in the designated prime markets, and because approval of the cities' requests for other direct service would entail a substantial federal subsidy out of proportion to public benefit. Petitioners do not contest these findings. Instead, they contend that the Board, in reaching its conclusion, failed to deal adequately with evidence and allegations relating to defense transportation needs and the air cargo traffic available at Texarkana. We do not agree.

In *Gulf States,* the examiner reviewed in detail (I.D. App. D, pp. 6–7)[3] all of Texarkana's evidence:

[3] "I.D." refers to the Initial Decision of the Hearing examiner.

the cities' size and economic characteristics; the transportation requirements of their defense-related installations; their past and present air service; their traffic (passenger and freight, civilian and military); and their traffic growth rates. He found that the cities had need for improved airline service, and thus considered Texarkana as a potential intermediate point on the Houston-St. Louis segment. But, as we have already shown, he concluded on balance that Texarkana had insufficient traffic potential to support a stop there on flights designed primarily for meeting the needs of the prime market.[4] The Board adopted these findings and conclusions (Order 69–9–18, pp. 2, 115).

Similarly, in *Central 81* the examiner evaluated Texarkana's needs and recognized, as did the examiner in *Gulf States,* that its traffic history did not give a completely accurate picture of Texarkana's traffic-generating ability. He also concluded, however, that there was insufficient traffic available to support all of the service Texarkana sought without a substantial increase in subsidy, and that the traffic potential was not sufficiently great to warrant the necessary subsidy support. These findings and conclusions of the examiner were adopted by the Board (Order 69–5–30, p. 2, n. 3).

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[4] The record showed that there were 1.1 Texarkana-St. Louis passengers per day in 1966. The daily number of passengers to all points enplaning at Texarkana in 1966 was 46 (on an average of six flights per day). It also showed .29 tons of air freight per day to all points during the same period. In 1965, 1500 tons of freight had been trucked by Texarkana's Red River Ammunition Depot to Dallas for air shipment to points not specified in the record. (I.D., p. 45, I.D. App. D, p. 7).

To be sure, the majority of the Board's findings are contained in the examiner's initial decisions. But these findings were explicitly adopted by the Board on discretionary review after full consideration of petitioner's exceptions to the initial decisions, together with the additional comments and changes made by the Board. Frequently, the Board adopts all or a part of the examiner's findings as its own without repeating or recasting them in its own opinion, a practice which the courts have found proper. *National Air Carrier Association* v. *Civil Aeronautics Board,* 442 F. 2d 862 (C.A. D.C.); *Division 1142, etc.* v. *Labor Board,* 294 F. 2d 264, 268 (C.A. D.C.); *North American Airlines* v. *Civil Aeronautics Board,* 237 F. 2d 209 (C.A. D.C.).

The findings are entirely adequate. The Board is not required to address itself in greater detail to the factors urged in support of more airline service to Texarkana. It considered petitioners' contentions and responded to them with articulate findings and reasons. No more is required of an agency. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173; *WAIT Radio* v. *Federal Communications Commission,* 418 F. 2d 1153 (C.A. D.C.).

Moreover, to require a more detailed articulation by the Board of the various factors relevant to its determination concerning Texarkana would be unrealistic in this case. In *Central 81* there were, in addition to the six carrier applicants and three civic petitioners, 58 parties participating as intervenors (four air carriers, 53 state or civic bodies, and the Depart-

ment of Defense); the mere statement of the issues in conclusory outline consumed a six-page appendix to the initial decision. As previously indicated, 33 applications by 14 carriers and 11 cities were at issue in *Gulf States* and, in addition, there were 21 intervenors actively participating in the case. As the court of appeals noted, "the large number of routes and proposed routes considered by the Board in its proceedings, and the multitude of parties and intervenors who participated, produced a record of unusual length and complexity" (Pet. App. 4a).[5] In fact, these related proceedings involved consideration of airline services throughout a major section of the country. Texarkana service was but one of hundreds of requests which had to be considered.

In these circumstances, the Board could not possibly address itself in detail to every consideration advanced by each of the "multitude of parties" (Pet. App. 4a) in support of its own particular request.[6] From its decision, however, it is abundantly clear that careful attention was given to Texarkana's request and the supporting contentions. Some of the requests were granted; others were denied for reasons which are clearly explicated and which reasonably support the determination.

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[5] "The joint appendix distilled from the record by the parties and filed in [the court of appeals] consists of 671 pages" (Pet. App. 4a). The full record covered some 57 volumes.

[6] As it was, the initial decisions in the two cases combined covered approximately 400 pages.

There are no special requirements for explicating specific findings relating to considerations of national defense needs when that factor is advanced along with many others in support of an application. While the Declaration of Policy, set forth in Section 102 of the Federal Aviation Act (Appendix *infra,* p. 12–13), specifies that the "needs of * * * the national defense" are one facet of the convenience-and-necessity standard, it also specifies others, including those the Board found decisive here—"sound economic conditions in * * * air transportation" and "the needs of the * * * commerce of the United States." Obviously, the significance of any one of the enumerated factors varies from case to case depending on the facts, and so does the need for detailed findings with respect to it. *Outagamie County* v. *Civil Aeronautics Board,* 355 F. 2d 900 (C.A. 7).

The Board's findings, incorporating the findings and conclusions of both examiners, were also adequate to enable the courts to perform their proper reviewing function. "[T]he path it followed can be discerned" and "its findings are [not] so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process." *Colorado Interstate Co.* v. *Comm'n,* 324 U.S. 581, 595.

2. Petitioners also urge (Pet. 10) that the case involves the "recurring problem" of the "weight" that agencies, such as the Board, should give to the views of the Department of Defense. It is well settled, however, that the weight to be given to evidence or testimony of any party is a matter within the sound discretion of the agency; where, as here, the record plain-

ly shows that defense-related considerations were not ignored, it is not a proper function of the reviewing court to reassess the Board's decision on the basis of the court's own evaluation of the "weight" that should have been attributed to certain evidence. Cf. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404.[7]

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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NOVEMBER 1971.

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[7] Petitioner's related contention that the Board "totally ignore[d]" its contention (Pet. 12–13) is without support in the record. The various requests and arguments by Texarkana were carefully considered. Two requests for new service were granted; the reason why the others were denied was fully explained.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301 *et seq.*:

TITLE I—GENERAL PROVISIONS

* * * * *

DECLARATION OF POLICY: THE BOARD

SEC. 102 [72 Stat. 740, 49 U.S.C. 1302]. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * * *

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401 [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371]. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

* * * * *

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * *

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